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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1504

BAGLEY PRODUCE, INC.,

Petitioner

vs.

THE NATIONAL LABOR RELATIONS BOARD,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 5, 1975

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The petitioner Bagley Produce, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 20, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix herein.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 20, 1975.

A timely petition for a rehearing was denied on February 12, 1975 and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. sec. 1254(1).

QUESTION PRESENTED

Whether the decision of the Respondent that there was protected concerted activity on the part of the discharged employees was arbitrary and capricious and beyond the bounds of its discretion in that it was not based upon any substantial evidence.

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28 (National Labor Relations Act):

> Sec. 157. Employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3).

Sec. 158. Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer -

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157;

.....

STATEMENT OF THE CASE

Petitioner Bagley Produce, Inc., is a small family owned, controlled and operated food processor. Its business consists of purchasing iced chicken which is shipped into the plant by truck, separating and packaging the parts of the chicken and selling it to local stores and restaurants. Petitioner employs about fifty production laborers of which ten or twelve are cutters. All employees are paid at a flat rate plus a production incentive and it is the company's policy to review wages at the beginning of each year and to grant raises each year around the end of February.

In November and December of 1972 occasionally an individual asked Richard Lohendorf, the plant manager, about a raise and he told her that it would be handled the way it always has.

On February 7, 1973, the cutting room foreman informed Mr. Lohendorf that some cutters wanted to talk to him. Mr. Lohendorf then went to the lunchroom and asked what the problem was. Barbara Harrison, one of the cutters, said the girls wanted a fifteen cent raise. Mr. Lohendorf told her that there was no problem, that he would talk to his father, Andrew Lohendorf, and his

brother James, the other officers of the corporation, about it when they came into work. He said this several times and then Ms. Harrison said that they would not go to work unless they had a fifteen cent raise right then and there. Mr. Lohendorf again told her that there was no problem and that he would take care of it when his brother and father came in. He said that he had always kept his word with them in the past and that the cutters had a poor attendance record so that was no attitude to have. He then went back to his office and several girls started to leave. Two of the girls, Virgie Jean and Marilyn Wesley came to his office and asked him what they should do and he told them to punch in and go to work but they did not do so, but left the plant with several others.

When Andrew and James Lohendorf came into work a short time later, Richard told them that some of the girls had walked out and refused to work. They discussed the matter several times that morning but came to no final conclusion although Richard Lohendorf thought that the girls who left should have been fired because of disloyalty and refusing to work. In order to keep the production going and to avoid spoilage of the chicken the officers helped with the production and other employees were moved in to help with the cutting.

After lunch, Mike Colon, the cutting room Foreman, told Richard that the cutters were at a nearby tavern and that they were drinking. Soon thereafter the officers decided to give all employees a raise of ten cents an hour. They also decided that they would try to get the cutters to come back to the plant and to talk about going back to work. The president, Andrew, called over to the tavern at about 1:00 p.m. and asked if any of

the cutters were there. When told that only Ms. Harrison was still there he asked to speak to her. He asked her to come back to the plant to talk but she said that she was waiting for another cutter, Ollie McDowell, who would be back in a half-hour and asked if she could wait till she came so that they could both come over. Mr. Lohendorf agreed but a half-hour later Ms. Harrison called him back and told him that Ollie had not arrived yet and asked whether it would be alright if she waited a while longer before coming over. Mr. Lohendorf told her to come over immediately or forget it and she said that she would be over in a few minutes. When she did not show up after an hour, it was decided that the girls who had refused to work that morning should be discharged because they refused to work and because Ms. Harrison did not come back to talk after having been requested to do so.

At 3:00 Ms. Harrison finally showed up smelling like alcohol at the plant. By that time the discharge notices were already being sent out. The next morning, the discharged cutters came to the plant at their usual starting time and they were informed that they had been discharged because they had refused to work the day before and then they left.

At the hearing before the Examiner the discharged workers testified that they had been at the tavern after work on February 6, and that even though they could not remember who said anything nor what any particular person said they had come to some kind of an agreement to ask for a raise the next day before starting work. Ms. Harrison testified that they had also decided to wait until they got a raise before they would go to work. Neither did they get together to discuss a raise

nor any of the alleged decisions were ever made known to the Petitioner until the commencement of proceedings by the Respondent.

It was also testified to by the discharged workers at the hearing that they had refused to work on the morning of the day they were discharged because the Petitioner's plant manager, Richard Lohendorf, had given them the day off. Even the examiner found this testimony to be incredible, but she rationalized the inherent incredibility of the testimony by concluding, without any basis in the evidence of her conclusion, that despite their unanimous testimony to the contrary, the girls intentionally misinterpreted what they were told by the plant manager. The examiner's supporting reason for this conclusion is an unexplained "of course."

The testimony of the workers also included claims of unionizing activity at the bar after they had refused to work and had walked out. It is undisputed that if any such activity took place it never became known to the Petitioner until the commencement of this action against them.

Virtually all of the girls involved unanimously claimed they were not striking, that simply taking the day off because "Dickie Lohendorf" gave it to them.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of Other Courts Of Appeals as to the Meaning of "Protected Concerted Activity."

It's crystal clear that on the basis of the testimony in this case, there was no Concerted Activity

with people willing to strike if the evidence establishing the taking of the day off because "Dickie" told us, is not to be believed there is no basis for the destructive decision ordered here.

The rule, first enunciated in First National Bank of Omaha v. NLRB, 413 F. 2d 921, 924 (1969), is that:

> Employees may seek to change any term or condition of their employment and their ultimate sanction is the strike. If they choose to strike over hours of work their strike is no different in quality or essence than is a strike over any other term of employment. What may make such a work stoppage unprotected is exactly what makes any work stoppage unprotected, that is, the refusal to assume the status of strikers with its consequent loss of pay and risk of being replaced. Employees who choose to withhold their services because of a dispute over scheduled hours may properly be required to do so by striking unequivocally.

Employee activity which unreasonably interferes with the employer's production without placing a commensurate economic burden on the employees is unprotected. Shelly and Anderson Furniture Manufacturing Co. Inc. v. NLRB, 497 F. 2d 1200 (1974). Under the law just cited, the actions of the workers in this case clearly were not such as to be protected by the National Labor Relations Act.

The discharged employees testified that they had not walked out nor had they any intention of coercing the employer by leaving. Each and every

discharged employee unequivocally stated that she was only taking a day off.[1] By so doing they were placing the Petitioner's operations in jeopardy since it had to meet its contracts for deliveries and since it had to process the chickens on hand in order to make room for the next truck load. Thus, by spontaneously taking a day off the discharged employees created a great risk not only to the business of the Petitioner but also of spoilage of the chickens and thereby created a threat of food poisoning.

For their part, the discharged employees only wanted a one day vacation and return to work the next morning as if nothing had happened. Thus, they were not subjecting themselves to any economic burden while they were inflicting a devastating burden on the Petitioner.

In an early case the Court of Appeals of the Seventh Circuit defined the term strike:

> The term "strike" is applied commonly to a combined effort on the part of a body of workmen employed by the same master to enforce a demand for higher wages, shorter hours, or some other concession, by stopping work in a body at a pre-arranged time, and refusing to resume work until the demanded concession shall have been granted. C. G. Conn v. NLRB, 108 F. 2d 390 (1939) ...

The testimony of the employees clearly indicates that they were not participating in any activity which could even remotely be called a strike. Although the Examiner found that the taking of the day off was pre-arranged, the testimony of Ms. Harrison, the purported spokesman of the group,

clearly indicates that there in fact had been no plan to engage in a work stoppage or in any other type of concerted activity.[2] When they left the plant on the morning of February 7, 1973, the discharged employees were only taking a one day holiday.

II. If the Decision Below Is Allowed To Stand The Entire Employer-employee Relationship Of American Business Will Be Adversely Affected.

It is hornbook law that in this country, unless he is limited by either a contract or statute, an employer has the right to discharge his employees at will, for any reason or for no reason at all. Mushroom Transportation Company v. NLRB, 330 F. 2d 683 (1964). Furthermore, under the National Labor Relations Act, it has been held that:

> Regardless of whatever concerted activities the employees were engaging in, if they were discharged for any other reason the employer does not violate the Act. Thus, the motivation of the employer in ordering the discharge is the crucial element in establishing a violation. NLRB. v. Ford Radio & Mica Corp., 258 F. 2d 457, 461 (1968).

Here it is undisputed that the Petitioner sent out the discharge notices only after the employees failed to meet with the Petitioner after being asked to do so and after the employees failed to meet with the Petitioner after being asked to do so and after they had taken a day off. Refusal to bargain and spontaneously taking a one day vacation surely are ample cause for discharge.

Furthermore, there can be no doubt that Petitioner never knew of the discharged employees alleged union activities since there is no testimony in the record from which it could even be inferred that Petitioner had such knowledge. [3]

The Petitioner acted, in discharging the employees, to protect his business. He was faced with chicken spoilage and possible people poisoning. To say that it was an unfair labor practice for it to fire seven or eight laughing girls out of a work force of fifty to sixty people, girls who knew that they would be getting a raise in the near future according to company policy, prior experience and assurances of Petitioner, girls who took the day off to imbibe at a bar, is to say that an employer must put up with any type of misconduct because it may turn out that there was a dispute that he did not know about. There is no indication that Congress intended the National Labor Relations Act to be used as a bar against any discharge.

III. Conclusion

There was more than ample cause for Petitioner to discharge the employees herein in question since they had placed his business in serious jeopardy by taking a day off. The evidence shows that the Petitioner was completely unaware of any concerted activity, union or otherwise, on the part of the employees and the record is completely void of any evidence upon which the Respondent could base its decision. To say that an employer must, in effect, use an Ouija Board, a divining rod or a crystal ball to determine what constitutes "protected concerted activities," under the circumstances of this case is patently unfair and unjust and must be regarded as an entirely new concept

of an American employer-employee relationship. The employees' own testimony clearly indicates that no concerted activity was ever planned, intended or carried out. Therefore, the Writ of Certiorari should issue to the Court Of Appeals of the Seventh Circuit so that this Court can prevent a serious injustice and clear up the confusion as to what is required to come within the National Labor Relation Act's protection as protected concerted activity.

Respectfully Submitted,

EISENBERG & KLETZKE

Counsel for Petitioner

FOOTNOTES

I. Ms. Barbara Harrison stated at the Hearing:

Q. Was Dickie approached by you on February 7 for the first time on this subject of whatever your problem was?

A. Dickie didn't approach me. I approached Dickie.

Q. Well, what was -- what was the first day you talked to him about this? Was it the morning you walked out?

A. To correct one thing, we didn't walk out.

Q. Well, were you pushed out?

A. Well, No. Weren't pushed out, either. He told us to leave. Told us to take the day off. (Tr. 172)

.....

Q. Then, why did you walk out?

A. Because for the simple reason he told us to take the day off. If I walk into your place and you tell me -- if you walk into my place, and I tell you to take the day off, what are you going to do? (Tr. 187)

.....

Q. Is it your statement that the only reason that you took off that day is because you were under the impression that Richard Lohendorf wanted you to take the day off?

A. Right. (Tr. 197)

.....

Q. Now, if the reason you took off was because Richard Lohendorf told you to take off, was there any other reason that you took off, or was that the only one?

A. That was the only one.

Q. At any time, did you thank him for giving you the day off? So you spent practically the whole day in a tavern; is that where you were?

A. Practically. (Tr. 198)

Ms. Harrison's testimony was further supported by Maria Hall at the hearing:

Q. Right? All right. Now, the next thing that happened is that you claim he said you can take the day off; is that right?

A. I didn't claim nothing. That's what he said.

Q. All right, and what -- did you decide not to punch in that day because he told you to take the day off?

A. Well, why should we punch in when he said take the day off?

Q. All right. So it was your -- When he said that, then your only reason for not working at that point after he made that statement is that he told you to take the day off?

A. That's right. (Tr. 389-390)

Marilyn Wesley stated:

Q. All right. Then when you left, was it because of your finger or because --

A. No.

Q. -- you understood --

A. No, it wasn't.

Q. -- that Dickie told you to take the day off?

A. I left because he said, take the day off.

Q. I see. Now, did you hear Dick say that or did you -- were you told that by Barbara Harrison?

A. No one told me anything. I heard him say it for myself.

Q. Were you talking to him at the time?

A. When I left, he say, take the day off. I heard it for myself. I was sitting in the lunch room. (Tr. 408-409)

At the hearing Lena Roby stated:

A. Dickie came out and he said, now girls, what can I do for you? And he put his arms around me and Ollie.

Q. Did he say anything at that point, do you remember?

A. Who, me? No, I didn't say anything.

Q. No. I say, did Richard Lohendorf say anything at that point when he put his arm around you and Ollie McDowell?

A. Yes. He say, well, girls, what can I do for you.

Q. Right. After this conversation with Richard Lohendorf in his office, what did you do then?

A. He told us to take the day off, so I left.

Q. Where did he say that?

A. In his office.

Q. Do you remember what else he said in the office?

A. No.

Q. O.K. You say you left. Where did you go?

A. To the tavern. (Tr. 426-427)

Ethel Jones testified as follows:

> Q. So did you decide to take the day off because he told you to take the day off or because you felt you wanted to take the day off?
>
> A. Yes. I felt if he was good enough to give us the day off, he was going to give us the raise when we come back.
>
> Q. I see. So you -- you decided in your mind that you were going to take the day off because he was good enough to give you the day off?
>
> A. Right.
>
> Q. That was pretty decent of him, wasn't it?
>
> A. Yes, it was. (Tr. 460)

Ollie McDowell testified:

> Q. (By Mr. Eisenberg) No, with reference to this walk out, is it your position that this walk out was a planned walk out?
>
> A. We didn't walk out.
>
> Q. Well, is it your position that if it wasn't a walk out, that you left because and only because you were told to take the day off?
>
> A. Right.
>
> Q. Now, at the time that you were told to take the day off, that was -- if what you say is correct as you've said it, that would have been the morning of what day?

A. Wednesday, February 7, 1973.

Q. All right, and you believe on that morning that you and anybody else who left, left because Richard Lohendorf, otherwise known as Richard and other wise known as Dickie in this hearing, told you to take the day off?

MR. GRECO: Objection.

Q. (By Mr. Eisenberg) Is that correct?

MR. GRECO: There's no foundation as to how she would know -- I'm sorry. I don't want to -- I don't know if it's proper to give the reason for the objection. I don't want to say that I'm supplying an answer.

JUDGE BOILES: Well, the witness can answer so far as she knows.

Q. (By Mr. Eisenberg) So far as you know.

A. Would you repeat the question?

MR. EISENBERG: Sure. Would you read it to her, please?

(Question read)

THE WITNESS: Yes. (Tr. 321-322)

II. CROSS EXAMINATION BY MR. EISENBERG of Ms. Harrison:

Q. So, with yourself, that would have only been six girls; is that right?

A. I guess so.

Q. And, did you take anything to a vote?

A. No.

Q. Did you elect anybody as chairman, or president or spokesman?

A. No.

Q. Now, what did -- that evening, what did Ollie have to say while you were at the tavern with her?

A. Like I told my Attorney, everybody was talking. I can't remember specifically, word for word what any particular person said.

Q. I see. So, you can't remember anything Ollie said that evening; is that right?

A. No.

Q. What about Virgie Dennis?

A. Same thing.

Q. You don't recall her saying anything; is that right?

A. Right.

Q. And, with reference to Lena Roby, do you remember her saying anything that evening?

A. No.

Q. No? What about Ethel Jones, do you remember her saying anything about evening?

A. No.

Q. Pardon?

A. No.

Q. And, Maria Hall, do you recall her saying anything that evening?

A. No.

Q. All right. You do recall that you were saying that you were going to ask for a fifteen cent raise. Is that right?

A. Right.

Q. And, if not, you said you would take no lower -- nothing lower than a dime; is that right?

A. Right.

Q. I see. Now, was that the sum and the substance of what happened there that evening?

A. I guess so.

Q. And, this was at the bar?

A. Yes.

Q. Next door, is it?

A. Yes. (Tr. 178-179)

.....

III. The Board witness, Michael Colon, brought into prove the employer knew of the "concerted effort" testified absolutely to the contrary:

MICHAEL COLON DIRECTION EXAMINATION adversely by MR. GRECO:

Q. (By Mr. Greco) What's your name?

A. Michael Colon.

Q. Address?

A. 2035 North Horton.

JUDGE BOILES: Spell your last name, please.

THE WITNESS: C-o-l-o-n.

JUDGE BOILES: C-

THE WITNESS: C-o-l-o-n.

JUDGE BOILES: C-o-l-o-n.

Q. (By Mr. Greco) Where do you work?

A. Bagley Produce.

Q. And what's your job there?

A. Manager.

Q. Tell us your duties.

A. Manager over the cutting room.

MR. GRECO: Like to proceed under 43-B, Your Honor.

MR. EISENBERG: We're going to object.

JUDGE BOILES: I'm not sure -- you haven't qualified him for that yet.

MR. GRECO: Okay.

JUDGE BOILES: If you feel you want to call him as a 43-B witness, you'd have to qualify him more.

Q. (By Mr. Greco) What are your duties as a manager?

A. Assign girls to work.

Q. What else?

A. Production.

Q. Hire people?

A. No.

Q. Fire people?

A. I can recommend but not hire,

Q. Do you fire people, recommend firing?

A. I do recommend, yes.

Q. Recommend promotions?

A. Promotion?

Q. If you have any, I'll withdraw that question. Do you recommend discipline?

A. Yes.

Q. Do you recommend that people be disciplined or suspended or something?

A. Right.

Q. Do you direct the girls every day?

A. Yes.

Q. Did you tell the company on Wednesday, February 7, 1973, that you had seen the girls in the tavern?

A. Yes.

MR. GRECO: Your Honor, can I proceed now?

JUDGE BOILES: I don't think you've qualified him as a 43-B witness, no. I don't think he's a managing agent. A supervisor but not a managing agent.

MR. GRECO: Okay.

Q. (By Mr. Greco) Did you go the tavern that day?

A. Yes.

Q. Who did you see there?

A. The cutters that were involved in the walkout.

Q. Who?

A. Barbara Harrison, Lena Roby, Ollie McDowell, Cora Tatum, Ethel Jones, Virgie Jeans. I think that's all I can remember.

Q. And after -- they show you the cards they had?

A. They show me the cards?

Q. You saw some cards there, didn't you, in the tavern?

MR. EISENBERG: Wait just a moment. I'm going to object to Counsel trying to lead a witness. This is his witness.

JUDGE BOILES: I sustain the objection.

Q. (By Mr. Greco) Did anyone ask you how many employees were in the unit or in the plant?

A. Well, Barbara Harrison come up to me once but I don't recall what she asked me.

Q. You don't recall?

A. No.

Q. Do you recall if anyone else said anything to you?

A. No.

Q. What did you do after you left the tavern?

A. Went back to work.

Q. Did you speak to anyone at work?

A. Spoke to Richard.

Q. And what did you tell him?

A. The girls were over there.

Q. Doing what?

A. They were just over there. He asked me if they were drinking. I said there was glasses in front of them.

Q. Did you indicate one way or another whether they were drinking liquor?

A. No, sir.

Q. Did you have any knowledge of whether they were drinking.

A. I paid no attention.

Q. What else was said to Richard?

A. I went back to work in back.

Q. Did you have any further discussions with him that day?

A. Oh, I probably spoke to him a couple times.

Q. About the cutters, I mean?

A. No, not about the cutters.

Q. How about the next day.

A. Well, that day I found later, around 4:30, they were fired, they weren't coming back.

Q. How did you find that out?

A. I was told by the office, Richard.

Q. What did he say?

A. That the girls won't be coming back.

Q. Did he say why?

A. No.

MR. GRECO: No further questions.